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# Plea Bargaining--Proposed Amendments to Federal Criminal Rule 11

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# Note: Plea Bargaining—Proposed Amendments to Federal Criminal Rule 11

## I. INTRODUCTION

The practice of plea bargaining within the courts of criminal justice is an ancient custom. It sprang from attempts to mitigate the harsh punishments of seventeenth century English courts,[1] and its use today often flows from the same motivation.[2] However, it has never been accepted as a rightful part of the federal trial process, but rather as a necessary evil below the dignity of the court, carried on with neither official recognition nor approval.

In 1971 the Advisory Committee on Criminal Rules of the Judicial Conference of the United States submitted proposed revisions to the Federal Rules of Criminal Procedure, including a new provision in Rule 11 recognizing the propriety of plea bargaining and setting forth a procedure for its implementation. This note will examine the present and proposed Rule 11, explore the revisions and additions proposed by the Committee and submit two additional proposals for consideration.

## II. PRESENT RULE 11

Rule 11 now provides that a defendant may plead not guilty, guilty, or *nolo contendere*. The court has the power to reject a plea of guilty or *nolo contendere* and must not accept either without first determining from the defendant that the plea is voluntarily and understandingly made, and that there is a factual basis for the plea.[3] The present rule was revised in 1966 to incorporate

1. J. HALL, THEFT, LAW, AND SOCIETY 68 *et seq.* (1935).

2. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 77 (1966).

3. FED. R. CRIM. P., Rule 11:

> A defendant may plead not guilty, guilty or, with the consent of court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The requirement that the court must determine that "there is a factual

into the Federal Rules the teachings of recent appellate court decisions on guilty plea procedures.[4] These 1966 revisions were an attempt to insure that the guilty plea was based on an informed decision. They also, for the first time, required the court to satisfy itself of a factual basis for the plea.[5]

Current Rule 11 not only protects the defendant by lessening the dangers of a coerced plea, but also protects the judicial process from the expense of time and money on frivolous appeals. By protecting the defendant from coercion, the system may also make him more receptive to the correctional process.[6]

## III. PROPOSED RULE 11

Even though the 1966 revision of Rule 11 was explained and amplified by court decisions, the need for even more explicit guidelines became clear. In response to that need, proposed Rule 11 contains two nearly distinct provisions: one applying recent court decisions to the current provisions of Rule 11, and the other creating a procedure for recognizing and implementing court-approved plea bargaining.

### A. Proposals to Clarify Current Rule 11 Practices

Proposed Rule 11 makes explicit the responsibility of the judge to personally address the defendant in open court, "informing him [of] and determining that he understands"[7] the nature of the charge, the range of punishment, and the waiver of Fifth and Sixth Amendment rights that accompany a guilty plea.

The requirement that the judge personally address the defendant is included in current Rule 11; the proposed change adds

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basis for the plea" means that the court must believe that the facts point to the defendant's guilt.

4. The primary decisions embodied in the new rule were Machibroda v. United States, 368 U.S. 487 (1962) (a guilty plea must be freely, knowingly, and understandingly made in order to be valid), and Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963) (specification of that which is required of a judge under Rule 11).

5. *See* note 28 *infra.*

6. For further discussion of the impact and basis for the 1966 revision, see Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace,* 32 U. Chi. L. Rev. 167 (1964); Comment, *To Plea or Not to Plea,* 7 San Diego L. Rev. 90 (1970).

7. Proposed Rule 11(c). [All references in this note to proposed rules are drawn from Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts (1971) (also set out at 52 F.R.D. 409 (1971)).]

"in open court." After the 1966 revision, controversy developed over how closely the judge must follow the prescribed ritual to avoid reversible error. In 1969 this question was settled when the United States Supreme Court held in *McCarthy v. United States*[8] that Rule 11 requirements were to be read strictly and literally.[9] The Court emphasized that Rule 11 is to provide procedural safeguards for the defendant and to insure a full and adequate record for rapid disposition of cases on appeal.[10] The additional requirement that such determination must take place "in open court" furthers both purposes. It insures that the determination occurs before a judge at a formal proceeding, rather than in judge's chambers or other informal encounter.

Proposed Rule 11 (c) (1) provides that the judge must inform the defendant and determine that he understands "the nature of the charge to which the plea is offered." A similar provision exists in current Rule 11, and such a requirement has been a continuing part of English and American law.[11] The United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[12] This right, most recently affirmed by the Supreme Court in *McCarthy v. United States*,[13] allows the defendant to prepare a defense and to protect himself from the danger of double jeopardy.

While current Rule 11 provides that the defendant be informed of the "consequences" of his plea, the proposed rule drops this general term and instead specifies what the consequences are and how they are to be explained to the defendant.[14] The court is to inform and determine that the defendant understands the

> the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered . . . .[15]

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8. 394 U.S. 459 (1969).
9. *Id.* at 463-64.
10. *Id.* at 465.
11. *See* Twining v. New Jersey, 211 U.S. 78, 101-02, 111-12 (1908).
12. U.S. CONST. amend. VI.
13. 394 U.S. 459 (1969). The courts have adopted the language of the Constitution when describing this requirement, and Rule 11 reflects the language in which this fundamental right traditionally has been couched.
14. Under the present rule, the judge may determine that the defendant's attorney has informed him of the nature of the charge and consequences of the plea. Proposed Rule 11 would eliminate this practice, since the court is to inform as well as to determine that the defendant understands.
15. Proposed Rule 11(c)(2).

The impetus for this change came from the Supreme Court's decision in *Boykin v. Alabama*.[16] Although the decision did not explicitly set out these requirements, the majority held that the same standards for waiver of right to counsel, *i.e.*, intelligent and voluntarily waiver, "must be applied to determining whether a guilty plea is voluntarily made."[17] By extending the waiver-of-counsel test into this area the Court brought to bear past decisions on waiver of counsel standards such as *Von Moltke v. Gillies*,[18] where the Court held that for a waiver to be valid, a judge must provide information on the "nature of the charge, the statutory offenses included within them, [and] the range of allowable punishments thereunder."[19] Thus the Advisory Committee has incorporated requirements into the guilty plea procedure which originated as courts broadened waiver-of-council requirements.

The proposed rule, however, is silent on any requirement that the judge inform the defendant about parole eligibility, applications of recidivist statutes[20] and possible deportation consequences. Although the Advisory Committee notes that parole eligibility often involves difficult and complicated determinations which may be made only after seeing a presentence report,[21] no such problem exists in informing the defendant of the possible application of recidivist statutes.[22] Some appellate courts have held that such information must be given.[23] Lack of such a provision renders Subsection (2) meaningless in cases where the court, in advising defendant of the maximum sentence for a specific offense, fails to mention the fact that it may be doubled if he is subject to a repeater statute. Informing the defendant of the possible effects of a guilty plea or a plea of *nolo contendere* on eligibility for deportation also should be required under proposed Rule 11 (c) because under present case law either plea results in a conviction that will activate deportation statutes.[24]

16. 395 U.S. 238 (1969).
17. *Id.* at 242.
18. 332 U.S. 708 (1948).
19. *Id.* at 724.
20. *E.g.*, 18 U.S.C. § 924 (1968) (unlawful possession or receipt of firearms).
21. Although proposed Rule 32 would allow the judge to examine the presentence report prior to the acceptance or rejection of the plea, requiring the judge to determine each defendant's parole eligibility status could constitute a major drain on court time.
22. A general caution delivered by the judge on the possible effect of recidivist statutes, whenever the judge felt such a statute would apply, would adequately warn the defendant and his counsel.
23. *See, e.g.*, Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Gannon v. United States, 208 F.2d 772 (6th Cir. 1953).
24. *See* 8 U.S.C. § 1251 (1952) (deportable aliens); Ruis-Rubio v.

Subsections (3) and (4) of proposed Rule 11 (c), which provide that the defendant be informed of the constitutional rights he is waiving by pleading guilty, also flow from the Supreme Court's decision in *Boykin v. Alabama*.[25] Subsections (3) and (4) of the proposed Rule state that the court is required to inform and determine that the defendant understands:

> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
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> (4) that if he pleads guilty or *nolo contendere* there will not be a further trial of any kind, so that by pleading guilty he waives the right to a trial by jury or otherwise and the right to be confronted with witnesses against him.[26]

Subsection (3) is designed to provide an explanation to the defendant of his Fifth Amendment right to remain silent and of the burden of proof of guilt on the prosecution, while Subsection (4) is designed to require an explanation to the defendant of the waiver of his Sixth Amendment right to trial and the right to be confronted by witnesses against him.

Proposed Rule 11 (d) expands the requirement of the current rule that the plea be "voluntary:" the proposal identifies factors such as force, threat or promises which would render the plea involuntary. The proposal specifies further, however, that promises resulting in plea agreements do not render the plea involuntary. Although these provisions clearly express the Advisory Committee's premise[27] that plea bargains (designated by the Committee as "plea agreements") do not in themselves render the plea involuntary, it and the rest of proposed Rule 11 (d) provide little guidance to the judge who must examine the voluntariness of a plea and then determine if the plea is acceptable.

Like the current rule, proposed Rule 11 includes a requirement that the judge must be satisfied of a factual basis for the plea.[28]

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Immigration & Naturalization Service, 380 F.2d 29 (9th Cir. 1967); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957).

25. 395 U.S. 238 (1959).

26. Proposed Rule 11(c).

27. JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 7, at 9 (Advisory Comm. Note).

28. Proposed Rule 11 (f): *Determining the Accuracy of Plea.* One of the primary reasons for this requirement is to avoid the possibility of an innocent defendant being convicted on a guilty plea. This could result from defendant's erroneous belief that his conduct constituted a crime, or a conscious choice to protect himself from the risks of trial or to protect others from prosecution or shame. The specter of the innocent defendant has long been raised in discussions of plea bargaining, particularly by

B. PROPOSALS TO BRING THE PLEA AGREEMENT INTO THE COURTROOM

The most significant change contained in proposed Rule 11 is its provision making plea bargaining a recognized part of criminal justice. Proposed Rule 11 (d) states the basic proposition: the plea must be "voluntary and not the result of force or threats or of promises apart from a plea agreement." Proposed Rule 11 (e) sets forth a plea agreement procedure and thereby lends the respectability of precise rules to what has heretofore existed as a largely *sub rosa* practice.

Plea bargaining has been the subject of extensive study, and the debate over its use has grown in recent years. The propriety of a practice which has existed without formal guidelines and has been carried on behind closed doors has long concerned legal scholars.[29] Beyond the issue of propriety of plea bargaining,

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those who believe that plea bargaining may coerce an innocent defendant into a plea of guilty.

This requirement of determination of a factual basis for a guilty plea does not extend to the plea of *nolo contendere*. The Advisory Committee note to the 1966 revision comments that for various reasons it is sometimes advisable to allow this plea without an inquiry into its factual basis.

The actual extent of such false guilty pleas remains unknown. *See* Comment, *Voluntary False Confessions: A Neglected Area in Criminal Administration*, 28 IND. L.J. 374 (1953). However, some commentators believe the problem has been exaggerated and argue that the critics are wrong. For example, it has been stated that the significant question is not how many people may be induced to plead guilty, but whether there is a significant likelihood that innocent defendants who would be (or have a fair chance of being) acquitted at trial might be induced to plead guilty. It is also suggested that this problem is not likely to occur because the defense attorney must cooperate to have a guilty plea entered, while a defendant may be convicted at trial despite his attorney's belief in his innocence. Enker, *Perspectives on Plea Bargaining*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE ON ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 113 (1967) [hereinafter cited as TASK FORCE REPORT].

The most common situation in which a false guilty plea arises is when a plea is offered to a lesser included offense in a sexual crime to avoid publicity and the humiliation of a trial. Although such pleas may be false, most commentators agree that such pleas should be allowed. *See, e.g., id.*

Appellate courts normally allow trial judges discretion in accepting such pleas, and the United States Supreme Court has held that an actual admission of guilt is not constitutionally required. North Carolina v. Alford, 400 U.S. 25, 37 (1970). Other cases have upheld the defendant's right to choose to plead guilty to a crime he did not actually commit. *See, e.g.*, McCoy v. United States 363 F.2d 306 (D.C. Cir. 1966).

A few states have forbidden guilty pleas to be entered in capital cases because of their concern with false guilty pleas. *See* CAL. CONST. art. I, § 8 (1954); N.J. STAT. ANN. tit. 2A § 113-3 (1953); N.Y. CODE CRIM. PROC. § 332 (McKinney 1968).

29. *E.g.*, Folberg, *The "Bargained-For" Guilty Plea—An Evaluation,*

scholars have seen a more basic question: is plea bargaining so inherently coercive that it always renders a guilty plea involuntary and hence unacceptable? The courts and commentators have discussed this problem at length, and the weight of opinion concludes that although some plea bargaining techniques and practices may be so coercive as to render the plea involuntary, the process itself is not inherently coercive.[30]

Because these issues of propriety and coercion, as well as the problems[31] and benefits[32] of plea bargaining, have been ex-

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4 CRIM. L. BULL. 201, 206 (1968). Folberg argues that it breeds misuse by both prosecutors and criminal lawyers. Prosecutors use it for weak cases and criminal lawyers too often disregard the best interest of their clients. He suggests that the practice would wither and die if exposed to the full view of court and public.

On the other hand, the Task Force Report presents a different perspective on the low visibility of plea agreements. Visibility is a matter of point of view, Enker suggests. While the current practice may be invisible to the court and public, it is highly visible to the defendant. By being given a role in the process of selecting his punishment, a defendant may not only feel less angry and frustrated at a highly impersonal process, but may be more receptive to rehabilitation. TASK FORCE REPORT, *supra* note 28, at 115.

For a good discussion of the problem, see Newman & NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DENVER L.J. 367 (1970).

30. The strongest argument against the inherent coerciveness of plea bargaining is that "[t]he conclusion that plea bargaining is unconstitutional depends on the determination that it exacts a price for the exercise of Fifth and Sixth Amendment rights." Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1400 (1970). The courts, however, have consistently refused to support this position. Although the United States Supreme Court struck down a provision of the Federal Kidnapping Act which arguably induced a plea agreement by its provision that a death penalty may be imposed only after a jury trial (United States v. Jackson, 390 U.S. 570 (1968)), the Court has refused to strike down similar state legislation, holding it not to be inherently coercive and not to have been coercive in the particular plea agreement before the Court. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). In *Brady* the Court stated: "We cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State." 397 U.S. at 753.

Federal and state appellate courts have held repeatedly that plea bargains are not inherently coercive. *See* Parrish v. Beto, 414 F.2d 770 (5th Cir. 1969); United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968); Rogers v. Wainwright, 394 F.2d 492 (5th Cir. 1968); Litton v. Beto, 386 F.2d 820 (5th Cir. 1967); Brown v. Beto, 377 F.2d 950 (5th Cir. 1967); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964); Note, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L.J. 430, 432 n. 14 (1970).

31. The problems of plea bargaining generally pointed out by legal scholars and courts are dangers of inaccuracy (*see* note 28 *supra*), the creation of unreliable conviction records, the inequality of opportunity among defendants to negotiate pleas (*see* note 71 *infra*), a general loss

tensively discussed elsewhere, this note will not join the debate. Rather it simply will accept the proposition that plea bargaining is not inherently coercive, and, if properly safeguarded, can be an appropriate part of the system of criminal justice.[33]

The proposed additions to Rule 11 are a response to the widespread use of plea agreements where there are no guidelines for court or prosecutor. Prosecutors in the United States have bargained with defendants and their counsel for at least the greater

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of judicial integrity and a growth in the defendant's cynicism. *See generally* Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514 (1969); Folberg, *supra* note 29; Newman & NeMoyer, *supra* note 29; TASK FORCE REPORT, *supra* note 28, at 9.

One side effect of guilty pleas and plea negotiations is that due process questions get no consideration. Since a guilty plea acts as a conviction so that the defendant never reaches the trial stage of proceedings, any evidentiary objections are waived. Some scholars view this result with alarm when they see the prosecutor bargaining cases in which police tactics make evidence unusable and which results in the courts being denied the chance to oversee police behavior. *See* Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. OF ILL. L.F. 584, 657 (1966). "What the due process revolution will have gained is simply shorter sentences." *Id.* at 657. *See also* United States *ex rel.* Glenn v. McMann, 349 F.2d 1018 (2d Cir. 1965); Watts v. United States, 278 F.2d 247, 250 (D.C. Cir. 1960).

32. Aside from the obvious value of saving the state time and money by avoiding trial, scholars have argued that plea bargaining makes a positive contribution to the system of criminal justice. Advantages urged for the system include protecting the integrity of the jury trial by preventing too many trials which would push jaded juries into presumptions of guilt; aiding the rehabilitation system by furnishing to it defendants who had confessed and therefore taken a first step in self-punishment, as well as by clearing the courts quickly so that others may have a quicker—and therefore more effective—encounter with punishment; saving the victim the embarrassment of testifying at a public trial, particularly in certain types of personal attack crimes; and providing the system with a more flexible means of fitting the punishment to the individual defendant. *See* D. NEWMAN, *supra* note 2, at 39, 77, 129; TASK FORCE REPORT, *supra* note 28, at 11; Newman & NeMoyer, *supra* note 29; Note, *supra* note 30, at 433; Note, *The Role of Plea Negotiation in Modern Criminal Law*, 46 CHI-KENT L. REV. 116 (1969).

33. This view has been supported by the recent Supreme Court decision, Santobello v. New York, 405 U.S. 251 (1971). While holding that prosecutors must keep plea agreements with defendants, Chief Justice Burger, writing for the majority, stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called plea bargaining, is an essential component of the administration of justice. Properly administered, it is to be encouraged. Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.

*Id.* at 261. The AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft, 1968), has also adopted this view.

part of this century,[34] and the practice today is widespread. It is estimated that guilty pleas account for 90 per cent of all convictions and perhaps 95 per cent of misdemeanor convictions.[35] Authorities believe a substantial proportion of these are the result of plea agreements.[36]

Proposed Rule 11(e)(1) provides:

> The attorney for the government and the attorney for the defendant may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense, the attorney for the government will move for a dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

In these provisions authorizing[37] plea bargaining, all of the

34. It is uncertain when the use of plea bargaining began in the United States.

> [S]tatistical studies indicate that it would be quite impossible to conduct the criminal business of the Federal Court without something which can only be distinguished from bargaining by logical hairsplitting.

Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 10 (1932). Although the criticism of plea bargaining has shifted from the view that plea bargaining is inherently bad because it compromises the state (*see* Arnold, *supra;* Miller, *The Compromise of Criminal Cases*, 1 So. CALIF. L. REV. 1 (1927)) to the view that plea bargaining is inherently bad because it coerces the defendant (*see* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970)), its use seems as widespread in the early 1900's as today. Concern over the practice, in fact, led New York in 1936 to attempt to curtail it by requiring prosecuting attorneys to submit the reasons for substituting a lesser plea in writing. For an account of the success of that venture see Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L. & CRIMINOLOGY 506 (1939).

35. *See* STANDARDS RELATING TO PLEAS OF GUILTY, *supra* note 33, at 1. The Task Force on Administration of Justice concluded in its study of plea bargaining that in one half to two thirds of the arrests which are actually prosecuted, 90 per cent of all convictions come from guilty pleas in many courts. TASK FORCE REPORT, *supra* note 28, at 4. For documentation of widespread use of the guilty plea in Massachusetts murder cases see Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK L. REV. 292 (1968).

36. *See* NEWMAN, *supra* note 2, at 3; TASK FORCE REPORT, *supra* note 28, at 9; Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

37. Although it is authorized, the use of plea bargaining is not mandatory, and some prosecutors and courts choose either not to use any type of plea bargaining, or to use a modified form. An extensive study of plea bargaining undertaken in 1964 indicated that a minority of prosecuting attorneys do not engage in plea bargaining. Of 83 replies to the surveys, a total of 11 (13.6 per cent) stated that they never engaged in plea bargaining. Note, *supra* note 36, at 897.

While Enker notes that plea bargaining in federal courts generally involves recommendations on sentencing rather than charge reduction

types of plea agreements in which prosecutors traditionally have engaged are permissible: a guilty plea to a lesser or related offense, a guilty plea to one of multiple charges on the condition that the others be dropped and a recommendation of sentence or a promise not to recommend sentence to the judge. One type of plea bargain not mentioned in proposed Rule 11 is "implicit plea bargaining," a widespread custom among judges of giving a lighter sentence after a guilty plea than for the same offense after conviction at trial.[38] While critics see these implicit bargains as an unconstitutional chilling of Fifth and Sixth Amendment rights,[39] judges themselves differ on its propriety.[40] Appellate courts have generally recognized and approved the practice when conducted within reasonable bounds.[41] The American Bar Association Project on Minimum Standards For Criminal

due to the fewer number of lesser related offenses included in federal crimes (TASK FORCE REPORT, *supra* note 28), a modification of general plea bargaining used in the United States District Court for the District of Minnesota in Minneapolis is contrary. Plea bargaining there exists only in charge reductions—no bargaining is done on sentencing and no recommendations for sentence are entered by the prosecutor. Minneapolis federal prosecutors believe that sentencing is a uniquely judicial function and should be so reserved. Interview with Joseph Livermore, Assistant United States Prosecuting Attorney, Minneapolis (Dec. 15, 1971).

38. Newman & NeMoyer, *supra* note 29, at 379; Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

39. *See, e.g.*, Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

40. Pilot Institute on Sentencing, *Judicial Conference of the United States, Proceedings*, 26 F.R.D. 231 (1959). Judges at this conference differed over the use of implicit plea bargaining. While some felt that a guilty plea should in itself have no effect on sentence, others believed that it should be considered in some circumstances; the remainder believed leniency was always appropriate after a guilty plea. The Conference as a whole concluded that

> the court is justified in giving a lesser sentence upon a plea of guilty than it would give upon a plea of not guilty, upon conviction for the same offense, after a trial in which the testimony of the accused is proved to be false or in which there is some other circumstance chargable to the accused evincing a lack of good faith.

*Id.* at 379-80.

41. In Dewey v. United States, 268 F.2d 124 (8th Cir. 1959), the court took judicial notice of the custom of trial courts of imposing a lighter sentence after a guilty plea than after the defendant had been convicted for the same offense after trial. However, in United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), the court set aside a sentence which clearly reflected punishment for going to trial. The court held that a person could not be punished because he defended himself in good faith, even if he was unsuccessful. This decision, however, did not prohibit extra consideration being given to a defendant who does plead guilty. *See* note 42 *infra*.

Justice has approved the judge's consideration of the guilty plea itself in reducing a defendant's sentence.[42] The lack of reference to implicit plea bargaining in proposed Rule 11 may result from several factors: its essential difference from bargains struck between prosecution and defense; the differences of opinion within the legal profession on its use; and the danger of appearing to give the prosecution a larger hand in the function of sentencing. Nevertheless, an affirmative statement that the judge could properly consider a guilty plea itself in reducing a defendant's sentence, patterned on the American Bar Association model, would be a valuable addition to proposed Rule 11.[43]

Proposed Rule 11 (e) (1) specifies that the court shall not participate in any plea discussions—a reflection of the view that judicial participation in the formulation of a plea agreement places intolerable pressure on a defendant to plead guilty.[44] Although judges generally do not participate in plea discussions,[45] appellate courts have been quick to condemn the practice and the plea whenever any indication of judicial overreaching exists.[46]

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42. STANDARDS RELATING TO PLEAS OF GUILTY, *supra* note 33. Under Standard 1.8, the American Bar Association advocates that judges consider certain factors in determining whether a reduction in sentence is appropriate. The Standard makes it clear that judicial discretion should be available to all defendants who plead guilty, not just to those who engage in plea bargaining. Standard 1.8 (b), however, specifies that the court should not impose on any defendant any sentence

> in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

A standard which allows judicial discretion and yet maintains guidelines for the judges might contain the following:

> If the agreed sentence appears within a reasonable range of an appropriate sentence after trial, it should satisfy the need to effectively deal with the offender yet not be an improper inducement.

TASK FORCE REPORT, *supra* note 28, at 13.

43. *See* text accompanying notes 71-72 *infra.*

44. *See* Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace,* 32 U. CHI. L. REV. 167, 171 (1964); Comment, *Duty of Trial Judge to Notify Defendant of Consequences of Guilty Plea,* 19 S.C.L. REV. 261, 266 (1967); Comment, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082 (1967); *FBA Convention Panel Discusses Judicial Role in Plea Bargains,* 5 CRI. L. 2453 (1969).

45. *See* Note, *supra* note 36, at 905. This survey resulted in findings that judges were present at plea bargaining sessions in a substantial minority of the cases; 32.3 per cent of the prosecutors responding stated that judges were sometimes present at plea bargaining sessions. *See also* NEWMAN, *supra* note 2 ,at 90-94, 103-130.

46. In Euziere v. United States, 249 F.2d 293 (10th Cir. 1957), the court vacated a conviction when a judge warned the defendant that he

The power and majesty of the judge, the courts have said, is so inherently coercive that a plea agreement cannot be voluntarily entered into by a defendant whose plea is produced at the suggestion of the judge.[47] A prior plea bargain confirmed by a judge, however, has been approved by appellate courts.[48]

The role that the judge is to take under proposed Rule 11 is set out in Subsection (e) (2):

> *Notice of Such Agreement.* If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.

This section reaches the heart of traditional criticism of plea bargaining as a system in which the defendant makes an agreement binding on himself but which may not be honored by the prosecution or the court. Because of the *sub rosa* nature of plea bargaining and the requirements for a voluntary plea in current Rule 11, the defendant has traditionally been forced to swear in court that no promises were made to induce his guilty plea. While this arrangement complied with Rule 11, it effectively blocked many defendants' later attempts to appeal unkept plea agreements.[49] In addition, judges often warn defendants that any prior promises are not binding on the court, further reinforcing the record against appeal, yet making little impact on defendants who had been fore-

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should plead guilty because if he put the state to the expense of a trial he would get the maximum punishment. In United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963), the court held that pressure by the judge on the defendant negated that "freedom of will which is essential to a voluntary plea of guilty." *Id.* at 567. "To impose upon a defendant such alternatives amounts to coercion as a matter of law." *Id.* at 567. In Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969), Chief Judge Bazelon held that a trial judge should not be a party to plea bargaining. *See also* Brown v. Beto, 377 F.2d 950, 957 (5th Cir. 1967).

47. *See* note 46 *supra.*

48. Appellate courts have held that a judge who undertakes to explain the exact consequences of a plea agreement versus a plea of not guilty is not necessarily putting undue pressure on the defendant. If properly given, such warnings supply a fuller understanding of the results of any plea. *See, e.g.,* United States *ex rel* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968); United States *ex rel* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963).

49. *See* Note, *Plea Bargaining—Justice Off the Record,* 9 WASHBURN L.J. 430, 434 (1970). Proposed Rule 11 (g) requires a record of all proceedings, along with a verbatim account of the plea agreement and the court's disposition of it. This requirement should aid appellate courts in determining the merit of post conviction appeals.

warned by their attorneys of the necessity of this ritual despite the existence of a plea bargain. The end result was a mockery of justice. The defendant and the prosecutor entered into a plea bargain which was denied in court and by which the defendant was bound, but which the prosecutor or court could abrogate with impunity.[50] When this inequality in bargaining position resulted in the defendant's inability to enforce a plea agreement, it violated the fundamental principle of fairness implicit in due process.[51]

These new proposals eliminate both the unfairness to the defendant and the hypocrisy of the plea acceptance. Plea agreements would become a matter of open record before the court, subject to judicial scrutiny. For the first time the judge would be in a position to look at the nature of the plea agreement and determine if the behavior of the prosecutor was so overreaching as to render the plea unknowing or involuntary.[52] The judge would also be given the choice of deferring his decision on the plea until he could study the presentence report, which because of a proposed revision in Rule 32 would be available to him prior to the acceptance of the plea.[53] This change would allow a judge who was uncertain of the propriety of the plea agreement to consider such factors as prior offenses, work record and family history in evaluation of the plea, and enable him to make a more informed decision on whether to accept or reject the plea.

The provisions for acceptance or rejection of the plea agreement and allowance for withdrawal of the plea if the court rejects the agreement eliminate the present unfairness to the defendant when he is bound by the guilty plea but the court is not. Proposed Rule 11(e) (3) and (4) provide as follows:

> (3) *Acceptance of Plea.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than provided for in the plea agreement.

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50. *But see* the discussion of Santobello v. New York, 404 U.S. 257 (1971), in note 57 *infra*.

51. *See* Dillon v. United States, 307 F.2d 445, 452 (9th Cir. 1962).

52. The proposed rule contains no criteria for acceptance or rejection of the plea; this will be left to the discretion of the trial judges. *But see* Judge Bazelon's opinion in Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970), for a discussion of the standards trial judges should employ.

53. Proposed Rule 32 (c) (1) (iv):

> The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty, except that a judge may, with the consent of the defendant, inspect a presentence report to determine whether a plea argeement should be accepted pursuant to rule 11(e) (3).

> (4) *Rejection of Plea.* If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

These provisions undercut a large body of criticism concerned with the lack of protection for the defendant who pleads guilty.[54] Under these provisions, the court must explicitly accept or reject the plea agreement, informing the defendant immediately[55] whether the bargain is to be upheld and giving him the opportunity to withdraw his plea in the event the agreement is rejected.

The importance of such judicial supervision over the procedural steps of plea bargaining was emphasized recently by the United States Supreme Court in *Santobello v. New York*.[56] The majority held that a plea agreement must be kept; a defendant has a right either to withdraw his plea or to obtain specific enforcement of the plea agreement if it is violated.[57] Since the case arose from a state decision, Federal Rule 11 technically had no bearing on the decision. However, the decision is extremely relevant in analyzing Federal Rule 11 and its proposed changes be-

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54. Courts have generally allowed a defendant to withdraw a guilty plea when an agreement with the *court* had been broken by the judge. *See, e.g.,* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 249 (S.D.N.Y. 1966), which allowed withdrawal in such a case on grounds that such a plea violated fundamental fairness and was involuntary. However, appellate courts have split on whether a *prosecutor's* promise, when broken, provides a basis for withdrawal of a guilty plea. Some courts have found the plea to be voluntary, especially if the accused was represented by counsel. More recent state cases, however, require the prosecutor's promise to be kept. *See, e.g.,* People *ex rel.* Valley v. Bannan, 364 Mich. 471, 476, 110 N.W.2d 673, 676 (1961); Courtney v. State, 341 P.2d 610 (Okla Cr. 1959); NEWMAN, *supra* note 2, at 36; Note, *Withdrawal of Guilty Pleas Under Rule 32 (d)*, 64 YALE L.J. 590 (1955).

55. The exception is when the judge waits until he sees the presentence report.

56. 404 U.S. 257 (1971).

57. "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. Chief Justice Burger, writing for the majority, remanded the case to the state court and left ultimate relief to the discretion of the state court. Justice Douglas concurred, but urged that the state court should give considerable weight to the defendant's preference: specific performance or withdrawal of the plea. Justices Marshall, Brennan, and Stewart, concurring in part and dissenting in part, concluded that when the defendant requested that his guilty plea be withdrawn and his right to trial reinstated, such relief should be given.

cause, presumably, the federal courts will be subject to the same requirements. *Santobello* requires that plea agreements be kept, and proposed Rule 11 provides a means for judicial scrutiny of the plea agreement and implementation of the agreement in judgment and sentence. If the plea agreement is accepted, it is immediately carried out in the sentence; if it is rejected, the defendant has the opportunity to withdraw his plea—one of the courses of action clearly approved by the Court in *Santobello*. If the rule is violated by the judge,[58] the defendant would be entitled to vacate his plea and plead again, because the United States Supreme Court has held that violation of Rule 11 constitutes reversible error.[59] Thus the procedure outlined in proposed Rule 11 would be sufficient to comply with the new requirements laid down by the Court in *Santobello*.

One of the most significant sections of proposed Rule 11 (e) is a provision in Subsection (3) which would allow the judge, in his discretion, to make a more favorable disposition of the case than the plea agreement provides.[60] This provision would furnish

58. For example, if the judge provides for a different disposition than in the plea agreement and that disposition is successfully challenged by the defendant as being less favorable to him than the plea agreement, there would be a violation of Rule 11.

59. In McCarthy v. United States, 394 U.S. 459, 463 (1969), the Supreme Court stated: "We hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11."

60. This opportunity for the defendant to be given only a more favorable disposition of his case than provided in the plea agreement or to be given the terms of the agreement itself is similar in effect to the military plea agreement system. In use since 1953, the military plea agreement system is based on a contractual agreement between the defendant and the convening authority (the commanding officer who institutes a court martial and who is required to give approval to the sentence). It is entered into after a written offer to plead guilty comes from the defendant and his counsel. The terms of the agreement are written into the record and reviewed on appellate levels. The trial judge, however, knows nothing of the agreement, and after hearing any mitigating evidence, sets the sentence. If the sentence is harsher than the agreement, the agreement prevails; if the sentence is more favorable to the defendant, the trial judge's sentence prevails. A defendant may withdraw his plea at any time prior to the final imposition of sentence.

Further safeguards have been provided by military appellate courts, which have read ambiguous plea agreements against the government rather than against the defendant, and by military review courts striking down plea agreements which infringe upon military due process—such as agreements to waive rights to appeal, or agreements not to raise certain issues at trial. United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); Lt. Infante, *Avoiding the Pitfalls of PreTrial Agreements*, 22 JAG J. 3 (1967); *FBA Convention Panel Discusses Judicial Role in Plea Bargaining*, 5 CRI. L. 2453 (1969); JAG MANUAL § .0109 Av(1)(c), (2)(d).

the judge with an effective means of protecting the defendant from prosecutorial overreaching short of rejection of the agreement and plea itself. This protection could prove especially valuable to the defendant who, because of inexperience or individual differences in counsel or prosecutors, has less opportunity to bargain successfully than other defendants in similar circumstances.[61] If the defendant accepted a plea agreement less favorable than the usual agreement reached by others in a similar situation, the judge would be allowed to make a more favorable disposition of the case than called for in the plea agreement. Without the explicit authorization of this provision, the judge might feel compelled to reject a plea which he felt to be unfair to the defendant and yet have no assurance that the defendant could negotiate a better plea with the prosecutor.

Once a plea is rejected or withdrawn, the question of its later use in evidence arises. Proposed Rule 11 (e) (6) specifies that:

> [i]f a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

This section would furnish the entire plea agreement procedure with an atmosphere in which defense and prosecution could negotiate without fear of any later use of the procedure as evidence against the defendant. The proposal follows and expands an early Supreme Court decision, *Kercheval v. United States*,[62] which held evidence of a prior guilty plea inadmissible at trial. Although a few states admit a withdrawn guilty plea into evidence at trial as if it were any other utterance of the party, most states follow the federal rule holding such records inadmissible.[63]

Overall, the proposed additions to Federal Rule 11 would take a long-standing criminal court practice and expose it to the light of judicial scrutiny. They also would set up procedures for explicit acceptance or rejection of the plea and provide written records of the proceedings. For the first time the judge would be provided with an adequate basis to determine the voluntariness of the plea in view of the bargain struck between the defense and prosecution. The proposals would provide a check on prosecutorial pressure through exposure of the agreement itself and through

61. *See* note 71 *infra*.

62. 274 U.S. 220 (1942).

63. *E.g.*, Kansas, Mass., and Neb. 4 J. WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1067, n.2 at 49 (3d ed. 1940, 1970 Supp.).

judicial power to protect and favor the defendant without actual rejection of the plea. Significant safeguards would be created for both the defendant and the public in reaching fair and accurate results.

## IV. ADDITIONAL PROPOSALS FOR THE PLEA AGREEMENT PROCEDURE

Although the proposed rule provides needed changes, additional provisions could resolve some remaining problems. While under proposed Rule 11 the defendant must be explicitly warned of his waiver of Fifth and Sixth Amendment rights accompanying a guilty plea, such waiver occurs prior to any concrete knowledge of the nature and extent of the prosecution's case against him. This situation enables a prosecutor to bargain with defendants whom he could not convict at a trial. Thus a weak case may serve as the prosecutor's motive for seeking a plea agreement.

In view of the constitutional right of the defendant to put the prosecution to its proof, such a purpose behind prosecutorial bargaining is unacceptable. The President's Commission on Law Enforcement[64] recognized that one of the major problems of the current plea bargaining system is that it occurs when knowledge of the opposing party's case is fragmentary.[65] Professor Donald Newman, in his most recent study of plea bargaining,[66] acknowledged the necessity for plea agreements but concluded that they should never be used simply because the prosecutor has a weak case.[67] The dangers of coercion of innocent defendants increases as the strength of the prosecutor's case declines, and under our current system of criminal justice, even the guilty defendant has a right to force the prosecution to prove his guilt.

An effective method of dealing with this problem would be to revise the discovery provisions of Federal Rule of Criminal Procedure 16 to allow the defendant to discover before pleading what he is now allowed to discover only before trial: written statements from the defendant, medical and scientific examination reports and names and statements of government witnesses. This revision would enable the defendant to examine the prosecution's case against him and would provide him with enough facts to make an informed decision whether to waive his Fifth and Sixth

64. TASK FORCE REPORT, *supra* note 28.
65. *Id.* at 11.
66. Newman & NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DENVER L.J. 367 (1970).
67. *Id.* at 400.

Amendment rights.[68] This discovery rule would act as a check on a prosecutor who uses plea bargains to cover his lack of convincing proof and would lessen the danger of coercing a false guilty plea from a defendant who believes a jury might be convinced of his guilt despite his actual innocence. While such a defendant could still choose to plead guilty, he would be making his decision with full knowledge of his position.

While such pre-plea discovery could lead to a reduction in the number of those who plea bargain as the uncertainty of trial results is reduced, it would eliminate only those plea bargains where the prosecutor's case would not be convincing to a jury—the very cases that should not be bargained.[69] Some defendants would refuse to plea bargain on the basis of information gained through such discovery, but others might well be persuaded that the prosecution's case against them was sufficiently strong to convict them, and would decide to bargain rather than face the jury.

Extending discovery to pre-plea proceedings could mean that the defendant's evidence would also be subject to discovery; thus the prosecution would be able to more fully evaluate its case. When discovery by the prosecutor reaffirms the strength of his case, his bargaining position is equally and justifiably strengthened. However, when such discovery indicates major flaws in the prosecution's case, it would force the prosecutor to reexamine his case, not just in regard to success at trial, but in consideration of the possibility of prosecutorial error which might result in dismissal of the case. The adversary system of criminal justice must bow to the overriding purpose of convicting only the guilty; the fuller use of discovery promotes this end.[70]

Another problem with proposed Rule 11 involves the inequality of treatment between those who plead guilty because of a plea agreement with the prosecution and those who plead guilty without such a plea agreement. According to several studies, defend-

68. *See* Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial,* 119 U. PA. L. REV. 527 (1971), for a thorough discussion of this proposal.

69. *See, e.g.,* Newman & NeMoyer, *supra* note 66; TASK FORCE REPORT, *supra* note 28.

70. This discussion does not attempt to reach the traditional arguments against criminal discovery: that discovery gives too great an advantage to the accused, that discovery can lead to tampering with evidence and suborning witnesses, and that in the adversary system of criminal justice discovery cannot be fair because of the limits imposed by the right against self-incrimination. *See,* D. LOUISELL, MODERN CALIFORNIA DISCOVERY § 13.01 (1963).

ants who enter guilty pleas without prior bargains are the young and inexperienecd in criminal courts—the defendants most deserving of judicial lenience, but the ones least likely to receive it because they have not made a plea agreement with the prosecutor.[71] This problem of inequitable treatment among similar defendants because of differences in bargaining experience or attorneys could be resolved by the adoption of a provision such as the American Bar Association Standard For Pleas of Guilty 1.8 (Consideration of Pleas in Final Disposition), which provides in part:

> (a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. Among the considerations which are appropriate in determining this question are:
>
> (i) that the defendant by his plea has aided in ensuring prompt and certain application of correctional measures to him;
>
> (ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;
>
> (iii) that the concessions will make possible alternative correctional measures which are better adapted to achieve rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
>
> (iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
>
> (v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;
>
> (vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

This standard authorizes judicial discretion in granting sentence and charge reduction to defendants who plead guilty or *nolo contendere* based on consideration of benefits to the public because of his plea. Such a provision is somewhat similar to the broad grant of discretion given to the judge in proposed Rule 11 (e)—discretion to grant a more favorable disposition than the plea agreement provides. However, the crucial difference is that the proposed Rule 11 grant of authority applies only to those

71. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956). This problem has been set out more recently in TASK FORCE REPORT, *supra* note 28, at 11.

cases where plea bargains have been made. The American Bar Association Standard would allow a judge to treat *any* defendant who pleads guilty as if he had plea bargained and therefore would allow reduction of his sentence or charge in any circumstances which warranted lenience. As an explicit authorization to all judges that such factors may be properly considered in determining sentence,[72] such a provision would be a valuable addition to the Federal Rules of Criminal Procedure.

72. *See* note 40, *supra,* for divisions among judges on the limits on their discretion in this area.